

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2024 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH Sd/-

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?

1 & 2 - Yes

3 to 5 - No

DECEASED RATHOD NAYAMATKHAN AHMEDKHAN THROUGH

Versus

M K DASS

Appearance:

MR BS PATEL for Petitioners

GOVERNMENT PLEADER for Respondent No. 1

NOTICE SERVED for Respondent No. 3

CORAM : MR.JUSTICE M.S.SHAH

Date of decision: 19/06/98

ORAL JUDGEMENT

This petition under Article 226 of the Constitution challenges the order dated 3.1.1997 passed by the State Government in the Revenue Department dismissing revision application No. SRD-CON-Vadodara-25-94 against the order dated 13.7.1994 passed by the Deputy Collector, Dabhoi in Consolidation

Case No. 7 of 1989 - Remand Case No. 16 of 1992 under the provisions of Section 9 of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 (hereinafter referred to as "the Act").

2. The facts giving rise to the filing of the present petition, briefly stated, are as under :-

2.1 The petitioners are the heirs of late Nayamatkhan Ahmedkhan Rathod (hereinafter referred to as "the deceased"). The deceased purchased a parcel of agricultural land bearing Revenue Survey No. 35 admeasuring 0-48-56 H.R.A. in the sim of village Marudiya, Taluka Tilakwada, District Vadodara. The land was purchased by the deceased from Nathabhai Karsanbhai Tadvi by a conditional sale deed dated 8.5.1970. Upon the death of Nayamatkhan, the present petitioners as heirs of the deceased are in possession of the land and have been cultivating the same.

2.2 In the year 1985, the Deputy Collector, Dabhoi suo motu initiated proceedings under Section 9 of the Act on the ground that the deceased had purchased the aforesaid land, which was a fragment, in violation of the provisions of Section 7 of the Act. The petitioners resisted the said notice particularly on two grounds. Firstly, the proceedings were initiated after gross delay of 15 years and, therefore, issuance of notice was illegal. Secondly, the transfer was not hit by the provisions of Section 7 of the Act, because the deceased was the owner of adjacent land bearing Revenue Survey No. 40.

2.3 The Deputy Collector rejected the aforesaid contentions and the State Government has also upheld the order of the Deputy Collector and, therefore, the petitioners have filed the present petition.

3. On behalf of the petitioners, it is submitted that the land in question was purchased as far back as on 8.5.1970 and, therefore, the authority could not have initiated any proceedings after a gross delay of 15 years. In this connection, reliance is placed on the decision of this Court in the case of Ranchhodbhai vs. State, 1984 (2) GLR 1225 and also on the unreported decision dated 22.8.1996 of the Supreme Court in Civil Appeal No. 5023 of 1985 (Mohamad Kavi Mohamad Amin vs. Fatimabai Ibrahim).

Secondly, it is submitted that in any view of the matter since the deceased was the owner of the adjacent

land, the transaction was not hit by the Act, but on the contrary saved by the proviso to Section 7.

4. In reply, the learned counsel for the respondents has submitted that when the transaction was found to be contrary to law, there cannot be any question of limitation as the transaction in contravention of Section 7 of the Act was void ab initio and such a transaction can be set aside after any length of time. Reliance is placed in this connection on the decision of this Court in the case of Patel Jividas Trikamdas & ors. vs. District Collector, Mehsana & ors. 1996 (2) GLR 688 and on the decision of the Supreme Court in the case of State of Orissa vs. Brundaban Sharma, 1995 Suppl. (3) SCC 249.

Secondly, it is submitted that deceased Nayamatkhan was not the sole owner of the adjacent land bearing Survey No. 40, but he was only one of the co-owners and, therefore, he was not exclusive owner of the said adjacent land. The subsequent partition of the adjacent land cannot improve the case of the petitioners as on the date of the transaction in question the purchaser of the fragment and owners of the adjacent land cannot be said to be the same person/s.

5. Having heard the learned counsel for the parties, this Court is of the view that in such matters, if the authority exercises the powers under Section 9 of the Act after a long lapse of time, the authority must consider the following important aspects :-

- (1) Whether the purchaser has altered his position by constructing permanent superstructure on the land or by incurring substantial expenditure for developing the land.
- (2) Whether the purchaser was guilty of any fraud or suppression of material facts before the authorities.
- (3) If two views are possible on merits, the authority should not interfere with the transaction, merely because it is possible to take a view for invalidating the transaction in question.

6. In the facts of the instant case while there is no material on the record of the present proceedings to show whether the petitioners had altered their position by constructing any house or by incurring any expenditure for development of the land, nor is there any allegation

of fraud or suppression of material facts. The material on record does, however, indicate that deceased Nayamatkhan was one of the co-owners of adjacent land bearing Survey No. 40. It is the case of the petitioners that the land in question was purchased by Nayamatkhan on 8.5.1970 in his capacity as a member of the joint family and merely because the land in question was purchased in the name of Nayamatkhan and the adjacent land was shown to be in the revenue record as joint property of the brothers it did not mean that the lands were owned by different persons.

7. Section 7(1) of the Act provides that no person shall transfer any fragment in respect of which a notice has been given under Sub-section (2) of Section 6 except to the owner of a contiguous survey number or recognized sub-division of survey number. The question which arises is whether a co-owner will also be covered by this exception. At this stage, it is also required to be noted that by introducing Section 8AA the legislature did contemplate co-ownership of land and, therefore, provided that where two or more persons are entitled to share in an undivided agricultural land and the land has to be partitioned amongst them, no such partition shall be effected so as to create a fragment. However, the legislature did not deny the right to purchase a fragment, which is conferred on the owner of a contiguous survey number, to a co-owner of a contiguous survey number. Moreover, purchase of such a fragment by one or more co-owners of a contiguous survey number will be more conducive to achievement of the object of the Act to prevent fragmentation and to achieve consolidation of holdings of agricultural lands.

8. In view of the aforesaid discussion, the orders of the State Government and the Assistant Collector, Dabhoi holding the transfer of land by late Nayamatkhan from Nathabhai Karsanbhai Tadvī on 8.5.1970 to be illegal and void are hereby set aside.

9. Rule is made absolute to the aforesaid extent with no order as to costs.

Sd/-

(M.S. Shah, J.)